Supreme Court, U.S.
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No. 06-172

In the
SUPREME COURT OF THE UNITED STATES

RONALD J. SOMMERS, TRUSTEE,
Petitioner,
v.
WELLS FARGO BANK OF TEXAS, N.A.,
Respondent.

On Petition For A Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

Appendix to Petition for Writ of Certiorari

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No. 04-20841

IN THE UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

In the Matter of AMCO INSURANCE; Rehmat PEERBHAI, Debtors.
Wells Fargo Bank of Texas N.A., Appellant,
v.
Ronald J. SOMMERS, Trustee; Amco Insurance; Rehmat Peerbhai, Appellees.

March 31, 2006.
Rehearing Denied May 4, 2006.

Before JOLLY, DENNIS and OWEN, Circuit Judges.
JOLLY, Circuit Judge:

The significance of this bankruptcy case relates to the *nunc pro tunc* substantive consolidation of the assets and liabilities of a corporation in bankruptcy and its sole shareholder, not in bankruptcy (until afterwards). Because the bankruptcy court's *nunc pro tunc* order was an abuse of discretion under the facts of this case, we vacate the district court's order and remand.

I.

Rehmat A. Peerbhai, an entrepreneur in the automobile industry, owned and managed AIG, a holding company in the automobile insurance business, prior to 1992.[1] On April 21, 1992, Peerbhai incorporated a new company, AIA, which sells automobile insurance. A parent-subsidiary relationship was formed between AIG, as parent, and AIA, as subsidiary, with Peerbhai acting as the sole owner of both companies. AIG, AIA, and Peerbhai are all debtors in bankruptcy proceedings that are at issue in this appeal.

In September 2000, Peerbhai, in his individual capacity, and AIG approached Wells Fargo for financing, and Wells Fargo agreed to enter into loan transactions with both. However, Wells Fargo required Peerbhai, AIG, and AIA to be independently audited by PricewaterhouseCoopers and Belew Averitt LLP before granting the loans. After reviewing the financial statements and audit reports, Wells Fargo agreed to lend money to Peerbhai as an individual, and to AIG. Wells Fargo extended a loan in the amount of $2.4 million to Peerbhai and AIG as co-borrowers, and another loan in the amount of $1.2 million to AIG. Wells Fargo required Peerbhai personally to guarantee AIG's corporate obligations, and Peerbhai executed a Continuing Guaranty on September 21, 2000.

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[1] This recitation of the facts is taken largely from the district court's opinion.

In December 2001, AIG breached a material loan covenant with Wells Fargo. On January 10, 2002, Wells Fargo filed, in state court, an Original Petition and Restraining Order against AIG based on this breach. AIA and AIG both filed petitions for bankruptcy under Chapter 7 of the Bankruptcy Code on February 4, 2002. On February 11, Wells Fargo filed a Motion to Lift Stay to Pursue State Court Litigation in the AIG bankruptcy case. The bankruptcy court entered an agreed order partially lifting the automatic stay on March 14, expressly permitting Wells Fargo to pursue state court remedies against Peerbhai individually. Wells Fargo began collection activities against Peerbhai, and thereafter Peerbhai requested that Wells Fargo forbear from exercising its legal and contractual rights and remedies until April 9, 2003. Wells Fargo and Peerbhai reached an agreement and executed a Limited Forbearance Agreement dated April 10, 2002, and they filed an Agreed Judgment settling the state court litigation. The state court entered the Agreed State Court Judgment on April 25, 2002, giving Wells Fargo a consensual lien on Peerbhai's homestead, as well as a judgment against Peerbhai pursuant to the terms of Peerbhai's Continuing Guaranty. The total amount of the Agreed State Court Judgment against Peerbhai was $3,398,956.16.

II.

On July 11, 2002, the Trustee for AIA, Ronald J. Sommers, filed an Application for Substantive

Consolidation ("Application"), seeking to consolidate AIA and Peerbhai as a single debtor in bankruptcy. At the time of the Application, Peerbhai was not in bankruptcy, and the Application sought essentially to put him into bankruptcy and relate his filing date back to AIA's February 4, 2002 filing date under the theories of "single economic unit" and "single business enterprise." Wells Fargo objected to the Application. On December 11, 2002, Peerbhai filed a Chapter 11 bankruptcy petition, which he later converted into a Chapter 7 petition.

The United States Bankruptcy Court for the Southern District of Texas held evidentiary hearings on the Application on May 2 and May 23, 2003. Sommers argued that Peerbhai and AIA were not separate legal entities, and that the finances of AIA and AIG were commingled by Peerbhai so that substantively consolidating all of Peerbhai's personal assets with the assets of AIA and AIG was the only way to ensure equitable distribution of the assets to the creditors of AIA and AIG.

On September 25, 2003, the bankruptcy court issued Findings of Fact and Conclusions of Law. It determined that Peerbhai engaged in a pattern of activity that was aimed at concealing AIA's proceeds from its creditors and from Peerbhai's personal creditors, that Peerbhai made no meaningful distinction between his funds and those of AIA while AIA was a going concern, that substantial identity between Peerbhai and AIA existed and AIA's creditors dealt

with Peerbhai and AIA as a single economic unit and did not rely on their separate identities in extending credit, that Peerbhai and AIA did not observe the corporate formalities required by Texas law, and that Peerbhai treated AIA as an alter ego of himself, using the AIA corporate status to commit fraud against his and AIA's creditors. Based on these findings, the bankruptcy court concluded that substantive consolidation was appropriate for several reasons: first, substantive consolidation would benefit all creditors, and not unfairly prejudice any creditor, because the financial affairs of AIA and Peerbhai were so entangled that the assets of each could not be segregated; second, substantive consolidation would avoid the harm of AIA's creditors receiving virtually nothing in a bankruptcy that was caused primarily by Peerbhai looting AIA; third, Wells Fargo would not be unfairly harmed by substantive consolidation because of Wells Fargo's knowledge and the circumstances surrounding the execution of the Limited Forbearance Agreement, and further that any prejudice Wells Fargo may suffer from substantive consolidation is not unfair, and is substantially outweighed by the benefits to other creditors; fourth, the fact that AIA and Peerbhai were essentially a single financial entity could not have been ignored by Wells Fargo or any other reasonably diligent party extending credit to Peerbhai; and fifth, substantive consolidation should be effective *nunc pro tunc* to the petition date of February 4, 2002, because at all relevant times, Peerbhai and AIA operated as one financial entity.

Wells Fargo appealed to the district court the bankruptcy court's November 17, 2003 Order Granting Substantive Consolidation. In that appeal, Wells Fargo argued for the first time that the Supreme Court of the United States effectively abrogated the doctrine of substantive consolidation in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, which held that a preliminary injunction, issued prior to any judgment essentially to prevent fraudulent transfer of assets, was an improper use of equity powers. 527 U.S. 308, 332, 119 S.Ct. 1961, 144 L.Ed.2d 319 (1999) ("[T]he equitable powers conferred by the Judiciary Act of 1789 did not include the power to create remedies previously unknown to equity jurisprudence. Even when sitting as a court in equity, we have no authority to craft a 'nuclear weapon' of the law like the one advocated here."). The district court, however, determined that substantive consolidation remains an available remedy despite the *Grupo Mexicano* holding, reading *Grupo Mexicano* narrowly and noting that *Grupo Mexicano* did not discuss the remedy of substantive consolidation.

Wells Fargo further argued that even if substantive consolidation is an available remedy, the bankruptcy court should not have applied it retrospectively to revoke Wells Fargo's interests in Peerbhai's assets. The district court noted that before a court may exercise its *nunc pro tunc* powers, that court must make an inquiry to determine whether retroactivity is necessary to achieve some benefit or avoid harm. The district court determined that the

bankruptcy court took the proper factors into consideration in determining whether to apply substantive consolidation retroactively, and thus its decision was appropriate.

Wells Fargo made a third argument to the effect that the bankruptcy court's alter ego conclusion was improper under Texas law, which requires proof of actual fraud. Wells Fargo contended that the bankruptcy court did not show that Peerbhai had the actual intent necessary to prove actual fraud. The district court held that based on the bankruptcy court's findings, the actions of Peerbhai prove that his intent to defraud was calculated, not accidental, and thus the bankruptcy court's decision regarding alter ego was not erroneous.

Wells Fargo timely appeals the district court's final judgment.

III.

Wells Fargo argues that the bankruptcy court did not have the power to order substantive consolidation and, in the alternative, that if the bankruptcy court had such power, it applied the wrong standard to determine whether substantive consolidation was appropriate. Further, Wells Fargo contends that substantive consolidation was inappropriate in this case and, finally, that the bankruptcy court erred in issuing the order to consolidate *nunc pro tunc*.

This Court applies the same standard of review to the bankruptcy court's decision as applied by the district court. *Total Minatome Corp. v. Jack/Wade Drilling, Inc. (In re Jack/Wade Drilling, Inc.)*, 258 F.3d 385, 387 (5th Cir. 2001). The bankruptcy court's findings of fact are reviewed under a clear error standard, while conclusions of law are reviewed *de novo*. *Id.* The determination of which standard to apply in order to assess whether substantive consolidation is appropriate is a question of law reviewed *de novo*. As to the bankruptcy court's decision to consolidate, some courts suggest that we review such decision under an abuse of discretion standard. *See, e.g., Reider v. Fed. Deposit Ins. Corp. (In re Reider)*, 31 F.3d 1102, 1105 (11th Cir. 994) (applying abuse of discretion standard to bankruptcy court's decision to consolidate estates of spouses, as explicitly authorized under the Bankruptcy Code); *First Nat'l Bank of El Dorado v. Giller (In re Giller)*, 962 F.2d 796, 799 (8th Cir. 1992) (stating that the abuse of discretion standard may be appropriate, but declining to resolve the question). This Court has stated that "substantive consolidation affects the substantive rights of the parties and therefore is subject to heightened judicial scrutiny." *Clyde Bergemann, Inc. v. Babcock & Wilcox Co. (In re Babcock & Wilcox Co.)*, 250 F.3d 955, 959 n. 6 (5th Cir. 2001). Furthermore, we review the bankruptcy court's decision to enter a *nunc pro tunc* order for abuse of discretion. *See Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters., Ltd., II (In re Briscoe Enterprises, Ltd., II)*, 994 F.2d 1160, 1170 (5th Cir. 1993);

see also Pac. Shores Dev., LLC v. At Home Corp. (In re At Home Corp.), 392 F.3d 1064, 1067 (9th Cir. 2004).

On March 14, 2002, the bankruptcy court entered an Agreed Order Partially Lifting the Automatic Stay to Proceed in State Court Litigation ("Agreed Order"). This order granted Wells Fargo's "Emergency Motion to Lift the Automatic Stay to proceed in the lawsuit [in state court] ..., to maintain its temporary injunction against [AIG] and pursue remedies against [ ] Peerbhai, individually[.]" Sommers and Wells Fargo both consented to the Agreed Order. The bankruptcy court, by granting the motion to lift the stay, and Sommers, by agreeing to it, explicitly authorized and consented to Wells Fargo's pursuit of state court remedies against Peerbhai. Because of this green light by the bankruptcy court, Wells Fargo expended its time and money to pursue the state court litigation until the suit concluded in the Limited Forbearance Agreement. Yet, when Sommers later filed his motion for substantive consolidation, which the bankruptcy court in turn granted, he then sought to undo what he had earlier specifically authorized by applying the consolidation of the estates *nunc pro tunc*. In granting the motion, the bankruptcy court stated that "[t]he avoidance of the liens granted to Wells Fargo by Peerbhai pursuant to the Limited Forbearance Agreement would simply return Wells Fargo to its position as of the petition date." We think it was a little late for this reversal of course.

The bankruptcy court, in granting Wells Fargo authorization to pursue the state court litigation, and then invalidating its authorization some twenty months later, and nineteen months after the litigation had terminated in a settlement, cited Section 105(a) of the Bankruptcy Code as its jurisdictional authority.[2] However, "[a] court's powers under § 105(a) are not unlimited[.]" *Mirant Corp. v. Potomac Elec. Power Co. (In re Mirant Corp.)*, 378 F.3d 511, 523 (5th Cir. 2004). Section 105(a) "does not permit [ ] courts to 'act as roving commission[s] to do equity.'" *Id.* (quoting *In re Southmark Corp.*, 49 F.3d 1111, 1116 (5th Cir. 1995)) (second alteration in original).[3] But even if the

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[2] The provision granting the bankruptcy court its general equitable powers states that:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a) (2005).

[3] We also note concerns regarding the consolidation of a non-debtor with a debtor, which is the essence of what the *nunc pro tunc* nature of the order granting substantive consolidation achieved. "The courts are

divided on whether they may order consolidation of a debtor with a nondebtor." 2 Collier on Bankruptcy ¶ 105.09[1][c] (15th ed. rev. 2005). Some courts have allowed such consolidation. *See, e.g., Soviero v. Franklin Nat'l Bank*, 328 F.2d 446 (2d Cir. 1964); *Walter E. Heller & Co. v. Langenkamp (In re Tureaud)*, 59 B.R. 973 (N.D. Okla. 1986). Others have cautioned that "as careful as the courts must be in allowing substantive consolidation of *debtors* to occur ..., the caution must be multiplied exponentially in a situation where a consolidation of a debtor's case with a non-debtor is attempted." *Morse Operations, Inc. v. Robins Le-Cocq, Inc. (In re Lease-A-Fleet, Inc.)*, 141 B.R. 869, 872 (1992). Still others have held that the bankruptcy court does not have subject matter jurisdiction over a non-debtor, thus precluding substantive consolidation, as § 105 of the Bankruptcy Code is not a jurisdictional grant, and further that substantive consolidation should not be used to circumvent the involuntary bankruptcy petition procedures of § 303 of the Bankruptcy Code. *Helena Chem. Co. v. Circle Land & Cattle Corp. (In re Circle Land & Cattle Corp.)*, 213 B.R. 870, 876-77 (Bankr.D.Kan.1997).

In this case, Peerbhai was a non-debtor on February 4, 2002, the date to which the bankruptcy court determined in its *nunc pro tunc* order that substantive consolidation relates. Peerbhai did not file his own bankruptcy petition for another ten months after the petition date of AIA and AIG, and five months after Sommers filed the Application for Substantive Consolidation. Because Peerbhai was a non-debtor for

bankruptcy court had the jurisdictional authority, it abused its discretion in exerting it. Furthermore, we think that the trustee, Sommers, should have been more circumspect in requesting such an order given his earlier approval of the litigation that resulted in settlement terms that could not have been unexpected. Wells Fargo relied on the agreement of the trustee and the approval of the court when it lifted the stay, and Wells Fargo made investments of its time and money because of this specific approval. Furthermore, nothing in the record suggests that Sommers knew anything more at the later date when he asked the court to grant substantive consolidation than he could have reasonably known at the time the Agreed Order was entered. This untimely withdrawal of approval might have been understood if the litigation had produced some anomalous and unexpected result, but it did not. On the other hand, the abrogation of the earlier approval worked to the significant prejudice of Wells Fargo.[4]

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such a substantial amount of the relevant time, special concerns exist. Substantive consolidation should be ordered with more caution than normal, and jurisdictional concerns may also be at issue.

[4] This abrogation also seems to be in tension with Section 105(a), which allows the court to *sua sponte* take action to enforce or implement its orders. In this case, the bankruptcy court appears to use its Section 105(a) powers to contradict its previous order.

Because we hold that the bankruptcy court erred in applying substantive consolidation *nunc pro tunc*, and thus vacate and remand for further proceedings, we decline to address Wells Fargo's arguments regarding the bankruptcy court's power to grant substantive consolidation and the proper standard for and application of substantive consolidation.[5] Given

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[5] Without deciding whether the bankruptcy court has the power to order substantive consolidation, we do note that those jurisdictions that have allowed it emphasize that substantive consolidation should be used "sparingly." *In re Owens Corning*, 419 F.3d 195, 208-09 (3d Cir.2005); *In re Bonham*, 229 F.3d 750, 767 (9th Cir.2000); *Union Sav. Bank v. Augie/Restivo Baking Co. (In re Augie/Restivo Baking Co.)*, 860 F.2d 515, 518 (2d Cir.1988); 2 Collier on Bankruptcy ¶ 105.09[1][d] (15th ed. rev.2005). It "is an extreme and unusual remedy." *Gandy v. Gandy (In re Gandy)*, 299 F.3d 489, 499 (5th Cir.2002). "Indeed, because substantive consolidation is extreme ... and imprecise, this 'rough justice' remedy should be rare and, in any event, one of last resort after considering and rejecting other remedies." *Owens Corning*, 419 F.3d at 211. Furthermore, it appears on the record before us that other remedies, such as the doctrines of alter ego and fraudulent conveyance, may have been available, and appropriate under the circumstances, and the bankruptcy court should duly make such considerations. Substantive consolidation should not be used as "a 'free pass' to spare [d]ebtors or any other group from proving challenges, like

that the order of substantive consolidation, in the absence of a *nunc pro tunc* order, appears likely to be fruitless, there is the probability that the issue will not arise on remand.

IV.

For the reasons stated, the judgment of the district court is VACATED, and the case is REMANDED for further proceedings consistent with this opinion.

VACATED and REMANDED.

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fraudulent transfer claims, that are liberally brandished to scare yet are hard to show." *Owens Corning*, 419 F.3d at 215. As the *Owens Corning* court noted, if the objectors to substantive consolidation were as vulnerable to the fraudulent transfer challenges as alleged, "then the game should be played to the finish in that arena." *Id.*

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WELLS FARGO BANK TEXAS, N.A.	§	
Appellant,	§	
versus	§	C.A. NO. H-04-0455
RONALD J. SOMMERS, et al.	§	[entered Sept. 6, 2004]
Appellees.	§	

ORDER

Pending before the Court is Appellant Wells Fargo's appeal from the bankruptcy court's order of November 17, 2003. (Instrument No. 2, at 1).

I.

The debtor, Mr. Rehmat A. Peerbhai ("Peerbhai") was an entrepreneur in the automobile insurance industry. (Instrument No. 10, Appendix 1, at 2-3). Prior to 1992, Mr. Peerbhai owned and managed one business entity, Amco Insurance Group ("AIG"). (Id.). On April 21, 1992, Mr. Peerbhai incorporated a new company, Amco Insurance Agency ("AIA") as a subsidiary of AIG. (Id. at 2). AIA acted as a general agent for the administration of various insurance

programs under a license issued by the Department of Insurance for the State of Texas. (Id.). A parent-subsidiary relationship was formed between AIG and AIA, and Mr. Peerbhai acted as the sole owner of both companies. (Id.). Both AIG and AIA are also debtors in the bankruptcy proceedings at issue in this appeal.

In September of 2000, Mr. Peerbhai, in his individual capacity, and AIG approached Wells Fargo for financing. (Instrument No. 9, at 4). Wells Fargo agreed to enter into loan transactions with both Mr. Peerbhai and AIG. (Id.). Before granting the loan, Wells Fargo required Mr. Peerbhai, AIG, and AIA to be independently audited by PricewaterhouseCoopers ("PwC") and Belew Averitt LLP (now known as BDO Seidman). (Id.). After reviewing the financial statements and audit reports, Wells Fargo agreed to lend money to Mr. Peerbhai as an individual, and to AIG as a corporation. (Id.). On September 21 , 2000, Mr. Peerbhai became personally indebted to Wells Fargo in the amount of $2.4 million and to AIG in the amount of $1.2 million. (Id.). In addition to requiring collateral to secure the loans, Wells Fargo required Mr. Peerbhai to personally guarantee AIG's corporate obligations. (Id.). Mr. Peerbhai executed a Continuing Guaranty dated September 21, 2000, making Wells Fargo the only creditor with a Continuing Guaranty. (Id.).

In December of 2001, AIG breached a material loan covenant with Wells Fargo. (Instrument No. 9, at 5). Based on this breach, Wells Fargo filed an Original Petition and Restraining Order against AIG on January

10, 2002 in the United States Bankruptcy Court for the Southern District of Texas. (Id.). On February 4, 2002, both AIA and AIG filed petitions for bankruptcy under Chapter 7 of Title 11 of the bankruptcy court. (Id.).

On February 11, 2002, Wells Fargo filed a Motion to Lift Stay to Pursue State Court Litigation ("Lift Stay Motion") in the AIG bankruptcy case. (Instrument No. 9, at 5). Wells Fargo sought to enforce its Continuing Guaranty against Mr. Peerbhai individually. (Id.). Wells Fargo pursued Mr. Peerbhai because he personally guaranteed the Continuing Guaranty. (Instrument No. 9, at 4). On March 14, 2002, the bankruptcy court entered an order partially lifting the automatic stay that expressly permitted Wells Fargo to pursue state court remedies against Mr. Peerbhai, individually. (Instrument No. 9, at 5). Wells Fargo initiated collection activities against Mr. Peerbhai. (Id.). Mr. Peerbhai then requested that Wells Fargo forbear from exercising its legal and contractual rights and remedies until April 9, 2003. (Id.). The parties reached an agreement and executed a Limited Forbearance Agreement dated April 10, 2002. (Id. at 6).

As contemplated in the Litigation Lift Stay Order issued on April 11, 2002, Wells Fargo and Mr. Peerbhai filed an Agreed Judgment ("the Agreed State Court Judgment") settling the state court litigation between Wells Fargo and Mr. Peerbhai. (Instrument No. 9, at 6). On April 25, 2002, the state court entered the Agreed State Court Judgment pursuant to which Wells Fargo received a consensual Lien on Mr. Peerbhai's homestead in the amount of $870,669.84.

(Id.). In addition to the homestead lien, Wells Fargo received a judgment against Mr. Peerbhai pursuant to the terms of Mr. Peerbhai's Continuing Guaranty. (Id.). The total amount of the Agreed State Court Judgment against Mr. Peerbhai was $3,398,956.16. (Id.). Mr. Peerbhai also represented that he, personally, owned additional real estate. Mr. Peerbhai pledged other, separate assets to Wells Fargo as collateral to secure his obligations under the Continuing Guaranty. (Id.).

On May 2 and May 23, 2003, the United States Bankruptcy Court for the Southern District of Texas held evidentiary hearings on an Application for Substantive Consolidation filed by Ronald J. Sommers ("Sommers"), the Chapter 7 Trustee for debtors AIA, and Mr. Peerbhai. (Instrument No. 10, Appendix 1, at 19). The Trustee sought to substantively consolidate AIA's estate with that of Mr. Peerbhai. (Id.). In effect, this would place Mr. Peerbhai in bankruptcy as of February 4, 2002 under the theories of "single economic unit" and "single business enterprise." (Instrument No. 9, at 7). As noted above, AIA and AIG were both owned by Mr. Peerbhai. (Id. at 4). At trial, Mr. Sommers attempted to show that Mr. Peerbhai and AIA were not separate legal entities. (Instrument No. 9, at 7). The Trustee believed that the finances of AIA and AIG were commingled by Mr. Peerbhai such that the only way to ensure equitable distribution of assets amongst the creditors of AIA and AIG would be to substantively consolidate all of Mr. Peerbhai's personal assets with the assets of AIA and AIG. (Instrument No. 10, at 5).

Upon hearing the evidence presented, the bankruptcy court made the following determinations: First, the bankruptcy court determined that Mr. Peerbhai engaged in a pattern of activity aimed at concealing proceeds from the operations and sale of AIA assets from both AIA's creditors and Mr. Peerbhai's personal creditors. (Instrument No. 10, Appendix 1, at 16-17). Second, Mr. Peerbhai made no meaningful distinction between his personal funds and AIA's while AIA was a commercial enterprise engaging in business. (Id. at 19). Third, the creditors of AIA dealt with Mr. Peerbhai and AIA as a single economic unit and did not rely on their separate identity in extending credit. (Id. at 20). Fourth, Mr. Peerbhai treated AIA as an alter ego and used the AIA corporate status to commit fraud against his personal creditors and AIA's creditors. (Id. at 21). Fifth, Mr. Peerbhai and AIA did not observe corporate formalities required by Texas law. (Id.).

Based on the above findings, the bankruptcy court made the following conclusions: First, the lack of financial records prevented the Trustee from being able to identify and segregate the affairs of AIA and Mr. Peerbhai as there was no autonomy between the finances of AIA and Mr. Peerbhai before the petition date. (Instrument No. 10, Appendix 1, at 19-20). Second, substantive consolidation will protect AIA's creditors from recovering virtually nothing in a bankruptcy that was caused largely by Mr. Peerbhai looting AIA. (Id. at 20). Third, in light of Wells Fargo's knowledge and the circumstances surrounding the

execution of the Limited Forbearance Agreement, Wells Fargo will not be unfairly harmed by substantive consolidation. (Id.). Fourth, the extent to which Mr. Peerbhai and AIA were essentially one financial entity prior to the petition date could not have been ignored by Wells Fargo or any other reasonably diligent party extending credit to Mr. Peerbhai. (Id. at 21). Fifth, the affairs of AIA and Mr. Peerbhai were so entangled, substantive consolidation of assets will be to the benefit of all creditors and no creditor will be unfairly prejudiced. (Id. at 21- 2). Sixth, substantive consolidation of Mr. Peerbhai's and AIA's assets should be effective *nunc pro tunc*, as Mr. Peerbhai and AIA acted as one financial entity during all relevant times. (Id. at 21).

On February 5, 2004, the Appellant, Wells Fargo filed this appeal against Mr. Sommers, AIA and Mr. Peerbhai from the bankruptcy court's order of November 17, 2003. (Instrument No. 2. at 1). Wells Fargo argues that the bankruptcy court exceeded its congressional and constitutional grant of authority when it issued an order for retroactive substantive consolidation of AIA's assets and Mr. Peerbhai's assets, (Instrument No. 2, at 1). Wells Fargo claims that the two accounting firms, PricewaterhouseCoopers and BDO Seidman, never found evidence that the assets belonging to Mr. Peerbhai, AIA and AIG were hopelessly or inextricably intertwined. (Instrument No. 9, at 7).

Wells Fargo contends that Mr. Charles Calvin, the loan officer responsible for the loans made,

reasonably relied on Mr. Peerbhai's representations about the Amco Companies and Mr. Peerbhai in making the loans. (Instrument No. 9, at 7). Wells Fargo also contends that, based on the evidence presented during the bankruptcy court evidentiary hearings, the Trustee failed to demonstrate that Mr. Peerbhai intended to perpetrate actual fraud on Wells Fargo or any other obligee for Mr. Peerbhai's direct personal benefit, as required by Texas Business Corporation Article 2.21. (Id. at 8).

On March 9, 2004 the Appellees make the following arguments in the Appellee's Brief. (Instrument No. 10, at 4): First, that at the time the loans were made, Mr. Calvin knew that AIA was the primary operating entity and that the source of income reflected on the financial statements belonged to AIA. (Id.). Second, that Mr. Calvin knew that income from AIA would be the primary source for repayment of the loans made to Mr. Peerbhai and AIG, and that Wells Fargo was aware that Mr. Peerbhai had a negative net worth apart from AIA. (Id.). Third, that Mr. Calvin was aware that AIG and AIA were separate corporations and that both were owned by Mr. Peerbhai. (Id.). Fourth, that Wells Fargo knew that Mr. Peerbhai had no net worth apart from his ownership in AIA and, therefore, Wells Fargo could not realistically claim that it relied on the separate credit of Mr. Peerbhai. (Id.).

II.

When reviewing a bankruptcy court's decision, the district court functions as an appellate court and applies the standard of review generally applied in the federal court of appeals. *In Re Webb*, 954 F.2d 1102, 1103-04 (5th Cir. 1992). Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses. *Id.* at 1104. The district court must ascertain whether the evidence supports the findings of the bankruptcy judge and determine whether the district court is "left with the definite and firm conviction that a mistake has been committed." *Id.* (citing *Anderson v. City of Bessemer*, 470 U.S. 564 (1985)).

Matters of law are reviewed *de novo* by the district court. *Matter of Coston*, 987 F.2d 1096, 1099 (5th Cir. 1992), *affd on reh 'g*, 991 F.2d 257 (5th Cir. 1993). *De novo* review requires the court to make a judgment independent of the bankruptcy court's, without deference to that court's analysis and conclusions. *In Re England*, 141 B.R. 495, 497 (N.D. Tex. 1991), *aff'd*, 975 F.2d 1168 (5th Cir. 1992).

The issues in this appeal concern questions of law. The court will therefore review the issues *de novo*.

III.

A.

Wells Fargo's main contention is that in light of *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999) ("Grupo"), the bankruptcy court erred in ordering substantive consolidation of the estates of Mr. Peerbhai and AIA. (Instrument No. 9, at 1). Wells Fargo argues that the doctrine of substantive consolidation was abrogated in the United States Supreme Court's holding in *Grupo*. (Instrument No. 9, at 8-11).

In *Grupo*, the Court offered some guidance regarding the circumstances under which lower courts may impose remedies such as preliminary injunctions on a debtor's assets. In *Grupo*, the respondent purchased unsecured notes from the petitioner, Grupo Mexicano de Desarrollo, S.A. ("GMD"), a Mexican holding company. *Grupo*, 527 U.S. at 310. Four GMD subsidiaries guaranteed the notes. *Id.* at 310. After GMD fell into financial trouble and missed an interest payment on the notes, the respondents accelerated the note's principal amount and filed the case in federal district court. *Id.* at 312. The respondents alleged that GMD was at risk of insolvency, or was already insolvent, and was showing preference to its Mexican creditors by its planned allocation of its most valuable assets to them. *Id* The respondents argued that these actions would frustrate any judgment they could obtain. The respondents requested a preliminary injunction restraining the petitioners from transferring

the assets. *Id.* The district court issued the preliminary injunction and ordered the respondents to post a $50,000 bond. *Id.* at 312-13.

The Supreme Court held that the district court had no authority to issue a preliminary injunction preventing the petitioners from disposing of their assets pending adjudication of the respondents' contract claim for money damages. *Id.* at 318-21. The Court was of the view that such a remedy was historically unavailable to a court of equity. *Id.*

With regard to the scope of authority for federal courts in bankruptcy proceedings, the Court in *Grupo* stated, "The equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789." *Id.* at 318 (citing, A. DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE 660 (1928)).

Wells Fargo thus argues that the holding in *Grupo* effectively prevents bankruptcy courts from applying remedies like substantive consolidation that were not available to the courts in 1789. (Instrument No. 9, at 10). Wells Fargo's interpretation of *Grupo* is broad and general. A liberal reading of *Grupo* may suggest that bankruptcy courts are barred from applying any remedy that was non-existent in 1789. This Court must determine whether the Court intended the holding in *Grupo* to be applied as a blanket rule or

whether *Grupo* was intended for a narrow range of cases with specific facts.

In *Grupo*, the Court determined that the respondents had not provided enough evidence for an exception to the general rule that a creditor must obtain a judgment before a debtor may be precluded from using their property. The Court stated, "Although the United States says that some of them 'might have been relevant in a case like this one,' . . . we are not inclined to speculate upon the existence or applicability to this case of any exceptions, and follow the well-established general rule that a judgment establishing the debt was necessary before a court of equity would interfere with the debtor's use of his property." *Grupo*, 527 U.S. at 320-21 (citing Brief of the United States as Amicus Curiae 11) (emphasis added). This statement suggests that the Court will allow exceptions to the general rule but only if the facts of that specific case allow for an exception.

The Court did not indicate that it intended a blanket application of its holding in *Grupo*. The Court was concerned with situations where creditors, without a valid judgment, could simply preclude debtors from using their assets for fear that nothing will be left over to satisfy their claims. As the Court stated, "Because any rational creditor would want to protect his investment, such a remedy might induce creditors to engage in a 'race to the courthouse' in cases involving insolvent or near-insolvent debtors, which might prove financially fatal to the struggling debtor." *Grupo*, 527 U.S. at 331. It is questionable whether the Supreme

Court intended for *Grupo* to be read such that any equitable remedy imposing a restriction on a debtor's assets should be denied irrespective of the underlying circumstances.

In this case, the primary issue is not whether Mr. Peerbhai's creditors are trying to impose an injunction on his property through substantive consolidation, thus preventing him from making effective use of his assets. Rather, the issue is whether Mr. Peerbhai so overwhelmingly commingled his personal assets with the assets of AIA and AIG that the only meaningful way to ensure the equitable distribution of assets among the creditors is to consolidate them.

The holding in *Grupo* should not be interpreted to provide a safe haven for debtors who commingle funds, refuse to follow corporate formalities, and deliberately fail to keep adequate records of related party transactions in a bid to conceal their assets from their creditors. Further, *Grupo* does not discuss the remedy of substantive consolidation nor call for its demise. Substantive consolidation, therefore, is still available as a remedy to the courts.

B.

Wells Fargo argues that even if the doctrine of substantive consolidation has not been abrogated by *Grupo*, the doctrine should not be applied retroactively and Wells Fargo's secured interests in Mr. Peerbhai's assets should not be revoked.

Before a court may exercise its equitable *nunc pro tunc* powers, an additional inquiry must be made to see whether retroactivity is necessary to achieve some benefit or avoid harm. *See* American Jurisprudence, *Retroactive Application of Consolidation Order*, 9A Am. Jur. 2d Bankruptcy § 803 (2004). The fact "that a creditor relied on the separate credit of an entity subsequently deemed consolidated in a bankruptcy case bears heavily on the issue of whether to order the consolidation to have a retroactive effect." (Id.). The bankruptcy court decided that retroactive application of substantive consolidation was appropriate in the present case.

As noted in the Standard of Review, the bankruptcy court's findings of law maybe reviewed *de novo* by the district court. The bankruptcy court's determination that Wells Fargo's actions rose to a level high enough to warrant a retroactive application of substantive consolidation is an issue of law the district court may review.

The bankruptcy court, in performing its analysis determined that: First, Wells Fargo did not rely on the separate credit of Mr. Peerbhai, AIA or AIG. (Instrument No. 10, Appendix 1, at 20). Second, substantive consolidation of AIA's and Mr. Peerbhai's assets will result in substantial benefit to all creditors. (Id.). Third, in light of Wells Fargo's knowledge about the commingled assets of Mr. Peerbhai and AIA, Wells Fargo will not be unfairly harmed by substantive consolidation. Fourth, the avoidance of liens granted to

Wells Fargo, will simply return Wells Fargo to its justified position as of the petition date. (Id.).

Based on a *de novo* review of the bankruptcy court's decision, the bankruptcy court took into consideration the essential elements for determining whether substantive consolidation should be applied retroactively. The bankruptcy court's decision is appropriate and should be affirmed.

C.

Wells Fargo's third attack on the bankruptcy court's ruling that Mr. Peerbhai and AIA were alter egos, is that, the bankruptcy court's ruling was improper under Texas Law. (Instrument No. 9, at 12-13). Wells Fargo however believes that had Texas law been applied during the bankruptcy court's determination of the alter ego claim, the outcome would have been different. (Id.). Texas law requires proof of "actual fraud" for a determination that a business owner used the entity as an alter ego. (Id.).

> Texas Business Act, Art. 2.21(A) and 2.21(2) states, in relevant part:
> LIABILITY OF SUBSCRIBERS AND SHAREHOLDERS
> A. A holder of shares, an owner of any beneficial interest in shares, or a subscriber for shares whose subscription has been accepted, or any affiliate thereof or of the corporation, shall be under no obligation to the corporation or to its obligees with respect to:

(2) any contractual obligation of the corporation or any matter relating to or arising from the obligation on the basis that the holder, owner, subscriber, or affiliate is or was the alter ego of the corporation, or on the basis of actual fraud or constructive fraud, a sham to perpetrate a fraud, or other similar theory, unless the obligee demonstrates that the holder, owner, subscriber, or affiliate caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the holder, owner, subscriber, or affiliate.

TEXAS BUSINESS ACT, ART. 2.21(A), 2.2 1(2).

Wells Fargo argues that the bankruptcy court failed to show that Mr. Peerbhai had the actual intent needed to prove actual fraud. (Instrument No. 9, at 12). This is an issue of mixed fact and law.

This Court's review of the records reveals that the bankruptcy court indicated numerous instances and cited many transactions aimed at concealing assets from the creditors of AIA, AIG and Mr. Peerbhai. (Instrument No. 10, Appendix I at 5-13). For instance, the bankruptcy court's findings indicate that twelve months prior to AIA's petition for bankruptcy and even weeks immediately before the petition date, Mr. Peerbhai took measures to transfer assets and transferred assets from AIA. (Instrument No. 10,

Appendix 1 at 5-13). Also, Mr. Peerbhai frequently omitted all relevant information from the books and failed to record substantial payments AIA made directly to Mr. Peerbhai during the 12 months before the petition date. (Id.). Mr. Peerbhai also set up a fictitious entity named Lex, to facilitate the transfer of funds away from his creditors. (Instrument No. 10, Appendix 1 at 12-16). Even weeks before the petition date, Mr. Peerbhai took steps to transfer assets out of AIA. (Id. at 13). The Court may deduce that if there was a time Mr. Peerbhai was more aware of his actions and the repercussions on his creditors claims, it was during the period immediately before bankruptcy. Based on the bankruptcy court's findings, Mr. Peerbhai's actions proving his intent to defraud his creditors were calculated and not merely accidental. The bankruptcy court's decision on the alter ego claim was not erroneous.

IV.

Based on the foregoing, Appellant's motion to dismiss the bankruptcy court's order for substantive consolidation **(Instrument No. 9)** is **DENIED**.

The Clerk shall enter this Order and provide a copy to the Galveston County Clerk for filing in the property record and to all parties.

SIGNED on this the 2nd day of September, 2004, at Houston, Texas.

/s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WELLS FARGO BANK TEXAS, N.A.	§	
	§	
Appellant	§	Civil Action No.H-04-0455
	§	
versus	§	[entered Sept. 6, 2004]
	§	
RONALD J. SOMMERS, et al.	§	
	§	
Appellant	§	

FINAL JUDGMENT

For the reasons stated in the Court's Order, signed on the 2nd day of September, 2004, this action is **DISMISSED.**

THIS IS A FINAL JUDGMENT.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED this the 2nd day of September, 2004, at Houston, Texas.

/s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITES STATES DISTRICT JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
	§	CASE NO. 02-31
AMCO INSURANCE	§	265-H5-7
AGENCIES, INC.	§	
DEBTOR(S)	§	[entered Sept. 25,
	§	2003]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On May 2nd and 23rd, 2003, the Court held an evidentiary hearing on the Application for Substantive Consolidation filed by Ronald J. Sommers, Chapter 7 Trustee for debtor Amco Insurance Agencies, Inc. The application seeks to substantively consolidate debtor's estate with the estate of Rehmat Peerbhai (Peerbhai). The Court has reviewed the application and the responses filed by Peerbhai and Wells Fargo Bank Texas, National Association (Wells Fargo). The Court has further considered the evidence and arguments presented at the hearing on the Application for Substantive Consolidation. The Court finds that the trustee's motion for substantive consolidation should be **GRANTED** and makes the following findings of fact and conclusions of law:

Findings of Fact

Debtor Amco Insurance Agencies, Inc., filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Texas, Houston Division, on February 4, 2002 (the Petition Date). Ronald J. Sommers was appointed Chapter 7 Trustee (the Trustee) for debtor on February 6, 2002.

The trustee filed the Application for Substantive Consolidation on July 22, 2002, and served a copy on all creditors identified by debtor, including Peerbhai, Amcorp General Agency, Inc., and PC Group Acquisition, II, Inc. Peerbhai and Wells Fargo filed the only objections to the Application for Substantive Consolidation.

At the time of its objections, Wells Fargo's proof of claim against debtor reflected a total claimed indebtedness of $9,970.01, allegedly incurred post-petition. The day of the hearing, debtor and trustee reached an agreement and debtor withdrew his objection. Peerbhai agreed to transfer remaining property held in his daughter's name to the trustee. The trustee agreed to dismiss adversary number _____ and to withdraw all proceedings against Peerbhai and his family.

Background of AMCO Insurance Agencies

Debtor was incorporated on April 21, 1992, under the laws of the State of Texas, with its principal

place of business in Harris County, Texas. Debtor represented to the Texas Department of Insurance that it was a subsidiary of Amco Insurance Group (AIG). Likewise, the schedules filed by debtor and AIG, which Peerbhai signed under penalty of perjury, state that debtor is a 100% wholly-owned subsidiary of AIG. At the same time Peerbhai signed the schedules stating that debtor was a subsidiary of AIG, he executed debtor's initial statement of financial affairs, which state that Peerbhai individually owns 100% of debtor's stock. In its consolidated 2000 tax return, debtor is identified as a wholly-owned subsidiary of AIG. Debtor's corporate books and records, however, show that Peerbhai individually owns 90% of debtor's stock, and his ex-wife, Mumtaz Bana-Peerbhai, owns the remaining 10%. According to debtor's corporate records, this ownership structure has remained constant since the formation of debtor.

According to debtor's corporate books and records, Peerbhai and his ex-wife, Mumtaz Bana-Peerbhai, have been the only directors since debtor's formation. However, debtor's schedules reflect that Peerbhai is the sole officer, director, and shareholder for debtor. Peerbhai has been chief executive officer since 1982. Debtor's chief operating officer was Sher Au Peerbhai (Sher Au), a brother of Rehmat Peerbhai. Debtor's chief financial officer was Saukat Peerbhai (Saukat), another brother of Rehmat Peerbhai. Among other duties, Saukat oversaw debtor's internal accounting department.

According to debtor's corporate books and records, it conducted no annual meeting of the board of directors or shareholders since 1999. While a special meeting of the board of directors was held on June 19, 2000, no other meetings were held between that date and the petition date.

In addition to its own internal accounting department, debtor had at least two outside accounting firms during the years preceding the petition date, Kershaw K. Khumbatta, P.C. and BDO Seidman.

The Business of Debtor

Debtor acted as a managing general agent responsible for the administration of certain automobile insurance programs under a managing general agent's license from the Department of Insurance of the State of Texas. As a general agent, debtor solicited, accepted and received applications for certain classes of automobile coverage, issued and renewed policies, collected and received premiums, and adjusted and paid losses and other claims.

Debtor was able to conduct its business by virtue of certain contracts and agreements with a fronting insurance company and a reinsurance company that ultimately backed the potential losses from the automobile insurance program. Since debtor was not an insurance company in the absence of such agreements and contracts with the fronting insurance company and the reinsurer, debtor could not solicit or issue automobile insurance policies.

The fronting insurance company prior to the petition date was State and County Mutual Insurance Company of Texas (State & County). The reinsurance company for the State & County policies issued by debtor was Gerling Global Reinsurance Corporation of America (Gerling).

Debtor solicited, accepted, and sold the automobile insurance policies across the state of Texas through various retail outlets. The majority of debtor's business involved non-standard auto insurance policies. Non-standard auto insurance policies provide the minimum liability coverage required by Texas law. Such policies are often issued on a monthly basis, and are renewed month by month. Approximately 80% of debtor's non-standard insurance business came from renewals of existing policies, and the balance came from new policies.

Debtor's retail outlets operated under the trade name "Amco Auto Insurance." These retail outlets fell into one of two general categories. The first category was "Company Stores," which were retail outlets owned and operated by debtor and staffed by debtor's employees. The second category of retail outlets was "Franchise Locations," which were owned and operated by independent sub- agents pursuant to "Independent Producer Agreements" between the sub-agents and debtor.

All of debtor's retail outlets were company stores until approximately 1999. That year, Peerbhai began selling company stores to his friends and family,

and later to other investors, to be operated as franchise locations. A franchise who purchased a company store bought the physical assets at the location, any lease for the retail store, the right to use debtor's trademarks, and all renewal business for policies originated by the location when it was a company store, among other assets. As discussed below, Peerbhai individually received all proceeds from the sales of the company stores. Debtor received nothing.

Insurance policy sales from franchise locations were not as lucrative for debtor as sales from company stores. For each non-standard insurance policy sold through a company store, debtor received a commission (a percentage of the premium paid), plus the policy issuance fee. For each non-standard insurance policy sold through a franchise location, debtor received only a small portion of the commission and a reduced part of the policy fees. At some point prior to the petition date, debtor stopped receiving any net commission sold by franchise locations as a result of the performance of the insurance book of business.

Sale of Franchise Locations

According to a franchise offering circular entitled "Prospectus," which debtor prepared in early 1999, debtor owned 134 operating company stores in Texas. No franchise locations were owned by debtor then.

By August 15, 2001, debtor had 133 franchise locations and only 42 company stores in Texas. All of

the franchise locations sold the same non-standard automobile insurance policies as sub-agents of debtor. The vast majority of debtor's company stores were transferred to franchisees between 1999 and the petition date. The transferred company stores represented a major portion of debtor's assets. They also accounted for most of debtor's revenue stream. The majority of these transfers were not documented, or, if they were documented, the documentation is not available.

To the extent that records of some transfers have been uncovered through the diligent efforts of trustee, they show that Peerbhai personally received the consideration paid by purchasers of debtor's company stores. Again, debtor received nothing from the sales and transfers of its assets. Some company stores were sold in exchange for cash paid directly to Peerbhai. Other company stores were sold for a combination of promissory notes and cash paid directly to Peerbhai.

Saukat Peerbhai, debtor's CFO, testified that Peerbhai individually received all payments made for the purchase of debtor's company stores. He also testified that Peerbhai personally handled the accounting and financing related to the sale of debtor's company stores.

In one example, debtor's outside auditors, BDO Seidman, discovered the existence of debtor's sale and transfer of company stores to Shimi Ventures, L.P. Shimi Ventures purchased several company stores, which were then converted to franchise locations. As a

result of this discovery, the auditors obtained the documentation of the transaction and researched the financial records regarding the transaction. While the transaction documents clearly reflected that Shimi Ventures purchased debtor's assets, the financial records reflected that Peerbhai individually received the consideration that Shimi paid for the assets.

Having traced the money received from Shimi Ventures to Peerbhai individually, the auditors compelled debtor to properly record this transfer to Peerbhai in its financial records. Prior to the auditors' action, debtor had made no record of the advance to Peerbhai.

After discovering the Shimi Ventures transfer and debtor's failure to report the payment of sale proceeds to Peerbhai, the auditors asked Saukat Peerbhai if debtor had engaged in any other similar transactions. Saukat failed to disclose the other sales and transfers to Peerbhai. Many other similar sales and transfers have since been discovered by the trustee, but the trustee is still unable to account for the sale and transfer of at least 25 stores. Further, the lack of records prevents the trustee from being able to identify and trace funds from the sale of dozens of others.

No sales of company stores by debtor during the year preceding the petition date have ever been disclosed in debtor's schedules or debtor's initial or amended statements of financial affairs, which Peerbhai signed under penalty of perjury. The Court

finds, however, that such sales did in fact take place during the year preceding the petition date.

The trustee has produced evidence that Peerbhai personally received in excess of one million dollars through his transfer of debtor's company stores. One example is a spreadsheet and related records that track payments on 16 outstanding promissory notes payable to debtor from certain franchisees. The spreadsheet was created and maintained by debtor's CFO arid COO, Saukat and Sher Mi. The spreadsheet reflects the purchase price that 16 franchisees agreed to pay debtor for an unknown number of company stores. It appears that 10 franchisees on the spreadsheet purchased one company store. The remaining six franchisees apparently purchased multiple company stores.

Peerbhai personally received all consideration paid by the 16 franchisees listed on the spreadsheet. Peerbhai claims that he does not know and does not have records to reflect the total amount that he received from these franchisees or what he did with the money that he received.

Another example involves sales to Welson Holdings, a purchaser that is not listed on the spreadsheet. In April 2000, Welson Holdings purchased a company store at 220 East Seminary Drive, Fort Worth, Texas 76115. The consideration paid for the store was a cashier's check for $125,000 payable to Peerbhai individually. Receipt of payment was acknowledged by Ike Mitha in his capacity as general counsel for debtor in a letter written on debtor's

letterhead. Welson Holdings purchased another company store in September 2000 with a $40,000 down payment to Peerbhai, and a promissory note made payable to Peerbhai for $40,000.00. The note itself reflects payment in full to Peerbhai. Again, debtor did not receive any consideration for the company stores purchased by Welson Holdings. These purchases are not noted in debtor's accounting or bank records. Furthermore, these sales were not disclosed to debtor's auditors in response to their direct requests for this information. Nor were these sales reflected on. the spreadsheet discovered by the trustee.

Kershaw Khumbatta was an accountant for both debtor and Peerbhai individually. Khumbatta was never provided any information about the sale of company stores, other than the Shimi Ventures transfer discovered by BDO Seidman, or about the proceeds from those sales. The only information regarding the sale that Khumbatta knew of was set forth in the financial statements audited (and corrected) by BDO Seidman.

Peerbhai's personal financial statements, and all other documents that he has produced to the trustee, fail to reflect any income from the sale of debtor's company stores. His personal financial statements also do not reflect what property or assets Peerbhai purchased with the proceeds from sales of debtor's company stores. There are no available records to show how much money Peerbhai received in exchange for transferring debtor's company stores to franchisees.

Pre-Petition Transfer of Debtor's Remaining Assets

On December 20, 2001, six weeks prior to the petition date, Peerbhai disposed of all remaining company stores and the rest of debtor's assets in a transaction. Consistent with the pattern of conduct described above, Peerbhai transferred debtor's remaining assets and individually received all the proceeds from the transfer.

Specifically, Peerbhai executed an irrevocable option agreement and bill of sale with Onyx Underwriters, Inc. (Onyx) and PC Group Acquisition, II, Inc. (PC Group), whereby Onyx and PC Group purchased all 1,000 outstanding shares of an entity known as Amcorp General Agency, Inc. (Amcorp General) from Peerbhai. "the Onyx/PC Group Transfer." Onyx and PC Group paid Peerbhai $1,501,000 for the shares.

Amcorp General is listed as a subsidiary of AIG on debtor's consolidated financial statements from 1998 to 2000, the last year that such statements were prepared. Peerbhai provided the consolidated financial statements to debtor's lenders, fronting insurers and reinsurers as an accurate depiction of his companies' business structure. Now, however, Peerbhai claims that he personally owned all of Amcorp General's stock prior to the Onyx/PC Group Transfer.

Amcorp General never had an employee, never owned assets, and never had operations of any sort. It did not maintain any financial records. Its franchise tax

records confirm that it had no assets and no revenues in the two years preceding the Onyx/PC Group Transfer.

The irrevocable option agreement identifies 191 franchise locations operating in the state of Texas, and states that Amcorp General is their franchiser. It identifies computers and other office equipment purportedly owned by Amcorp General. The agreement purports to transfer "all applicable licenses, permits, franchises, trademarks, service-marks, registrations, rights-to-do business. . . and all other property, tangible or intangible, associated with the business of the Agencies and/or the Amco organization." The agreement also expressly provides that Amcorp General is not liable "for any of the obligations of AMCO Insurance Agencies, Inc. and/or any of its affiliates." Onyx, PC Group and their affiliates have operated debtor's general agency business since the Onyx/PC Group Transfer occurred.

However, the Court finds Amcorp General did not have the license or the ability to franchise "AMCO" auto insurance retail outlets. Amcorp General did not own any computers or other office equipment. Most importantly, Amcorp General did not own the "licenses, permits, franchises, trademarks, service-marks, registrations, rights-to-do-business.. . and all other property, tangible or intangible, associated with the business of the Agencies and/or the Amco organization." It did not own any assets at the time of the Onyx/PC Group Transfer, much less all the assets used in debtor's business.

Peerbhai admitted that the assets transferred as part of the Onyx/PC Group Transfer belonged to debtor, not to Amcorp General or to him individually. Saukat, debtor's CFO, also admitted that the assets transferred as part of the Onyx/PC Group Transfer belonged to debtor, and not to Amcorp General. Saukat further admitted that Amcorp General had no assets and was an empty shell corporation when the Onyx/PC Group Transfer occurred.

Peerbhai did not differentiate between himself and debtor. Peerbhai failed to keep records or concealed records reflecting the sale of assets belonging to debtor. Peerbhai failed to keep accurate records of his receipt of the proceeds from the sale of debtor's assets or his use of those funds.

Peerbhai testified that he freely took money out of debtor at will and without making a record of such transfers. For example, Peerbhai made the following admission at his deposition, "I always thought [Debtor] belongs to me. I'm the sole shareholder. So I can take out a million dollars or put in a million dollars. It's my company. That's the way I took the company.. . . and when there were funds in the company, I took them out." (Deposition of Rehmat Peerbhai, May 30, 2002; page 250, lines 4-10.) While he freely took funds from debtor and sold its assets for his personal gain, Peerbhai has concealed the trail of the funds to avoid the consequences of having taken them. Due to the lack of documentation, it is presently impossible to determine how much money Peerbhai personally received from selling debtor's assets.

The lack of record keeping is not surprising because Peerbhai and debtor's other chief officers treated debtor's assets and Peerbhai's assets as a common fund. Sher Au, debtor's COO, testified that he made no meaningful distinction between Peerbhai's assets and debtor's assets:

Q. The corporate distinctions [between Peerbhai and debtor] mean nothing to you then really?

A. It does, you know, but he is controlling the whole company.

Q. And what's the company's is his?

A. Yes.

Q. What's his is the company's? Is that right?

A. Yeah.

(Deposition of Sher Mi Perrbhai, September 27, 2002; page 158, line 25 to page 159, line 8.)

As part of the Onyx/PC Group Transfer, Peerbhai caused debtor to enter into an asset purchase agreement with Amco Retail LLC (Amco Retail) to transfer its remaining 33 company stores (the Amco Retail Transfer). The principals of Onyx PC Group (PC Group principals) created Amco Retail for the purpose of purchasing debtor's company stores in December 2001. The Amco Retail Transfer was part of the overall agreement between Peerbhai and Onyx/PC Group.

The Amco Retail Transfer would not have happened without the Onyx/PC Group Transfer.

The transfer of the remaining 33 company stores includes their "machinery, equipment, furniture, supplies, inventory, tools, fixtures leasehold improvements and other tangible personal property," their leases and, most importantly, the Company Stores' Book of Business and Goodwill" to Amco Retail. Amco Retail was supposed to pay $100,000 to debtor in exchange for the transfer. Debtor's bank and accounting records, however, do not show that it received any such payment. It appears that Peerbhai individually received this payment as well.

Four months before the Onyx/PC Group Transfer and the Amco Retail Transfer, the PC Group principals met with Peerbhai to discuss purchasing all of the assets covered by those transfers. They memorialized their discussion in a signed "Business Points" memorandum.

The business points memorandum, and the testimony concerning the structure of the earlier proposed sale, reflect that the PC Group principals and Peerbhai were discussing the transfer of the entire Amco automobile insurance business to PC Group. This earlier proposed transfer would have included the same assets that were ultimately made part of the Onyx/PC Group and Amco Retail transfers. None of the assets were asserted to belong to Amcorp General. The PC Group principals would have paid approximately $12,500,000 for those assets in August

2001. Peerbhai sold these same assets belonging to debtor in December 2001, six weeks before the petition date, for a total of $1,601,000 paid to him individually.

Peerbhai executed the Onyx/PC Group Transfer and the Amco Retail Transfer with the intent to hinder debtor's creditors and to personally profit at debtor's expense. The transfers denuded debtor of almost all of its assets, and the transfers effectively terminated debtor's ability to operate as a going concern. Peerbhai received all the consideration paid for the transfers while debtor received nothing for its assets and business.

Debtor's financial statements dated December 31, 2000, show its fixed assets valued at $1.4 million. According to debtor's schedules, its fixed assets had a value of only $10,000 by the petition date.

The Lex Transfers

In the weeks immediately before the petition date, Peerbhai took certain measures to transfer other assets of debtor. Debtor was the payee under certain outstanding promissory notes made in connection with purchases of company stores. Peerbhai caused debtor to purportedly transfer these promissory notes to a newly formed entity which he owned and controlled, Lex Financial Corporation (Lex). As admitted by Peerbhai and his brothers, the payments under the notes had always been made to Peerbhai personally. Had this purported transfer not been discovered by the trustee, Peerbhai (or his assigns) would have continued

to receive payments under the promissory notes which were given in exchange for the sale of debtor's company stores.

Specifically, at Peerbhai's direction, Lex was formed on January 3, 2002. Ike Mitha, serving as debtor's general counsel, handled the formation. Peerbhai was Lex's sole director, officer, and shareholder. On January 4, 2002, Peerbhai executed a bill of sale on behalf of debtor transferring eleven outstanding promissory notes to Lex (hereinafter, the Lex Transfer). The eleven promissory notes are included in the spreadsheet of sixteen promissory notes referenced above.

As of January 31, 2001, the eleven notes transferred from debtor to Lex remained unpaid. The payment status of the other five promissory notes identified in the spreadsheet is presently unknown and undeterminable. As CEO of debtor, Peerbhai appears to have released at least two of the five unaccounted for promissory notes in exchange for discounted cash payments made to him personally in the month before the petition date. These notes were due to debtor from Alex Trevino and Shafine Sadruddin.

The bill of sale between debtor and Lex, both owned and controlled by Peerbhai, states that Lex paid debtor $100,000 for the eleven promissory notes. Neither Lex nor Peerbhai, however, have actually paid debtor the $100,000 referenced in the bill of sale.

The Lex Transfer was omitted from debtor's schedules and initial and amended statements of financial affairs. Peerbhai did not disclose the Lex Transfer to the trustee or trustee's counsel. Peerbhai attempted to conceal the Lex Transfer from the trustee and debtor's creditors.

Peerbhai further attempted to secret the promissory notes due to debtor by transferring and assigning the promissory notes and the stock of Lex to his brothers, Saukat and Sher Ali. Saukat and Sher Ali then attempted to collect the notes from the payees. Following a scheme originated by Peerbhai, Saukat and Sher Ali attempted to collect on the promissory notes by holding out Lex as an independent company. Of course, it was not. Once Saukat and Sher Ali's involvement in the secreting of the promissory notes was discovered, they rescinded the transaction with Peerbhai.

At the time of the purported transfer of the promissory notes from debtor to Lex and the transfer of Lex to his brothers, Peerbhai was involved in separate litigation with debtor's largest credit, Gerling Global Reinsurance Corporation of America (Gerling), and with Wells Fargo.

Gerling was the primary reinsurer of the AMCO automobile insurance program. Gerling filed its original petition and application for temporary restraining order and temporary injunction on January 3, 2002 in the 95th Judicial District Court of Dallas County, Texas (hereinafter, the Gerling lawsuit). The

Gerling lawsuit named Peerbhai, debtor, Amcorp General, and other Amco entities controlled by Peerbhai as defendants. The Gerling lawsuit alleged, *inter alia*, that debtor and/or its affiliates used premium fluids held in trust for Gerling to pay its operating expenses, converted other funds due to Gerling, overpaid commissions to itself and abandoned its obligations to administer the insurance program that Gerling reinsured.

On January 4, 2002, the same date as the Lex Transfer, the attorney representing Peerbhai, debtor, and the related Amco entities, executed a binding Rule 11 agreement with Gerling's counsel that obligated debtor and the other Amco corporate defendants "not to transfer, dissipate or encumber any of their assets outside the normal course of business until the time of the hearing."

On January 24, 2002, a temporary restraining order was entered in the Gerling lawsuit that ordered debtor and the Amco corporate defendants to "refrain from transferring, encumbering, or dissipating any of their assets outside the normal course of business until the time of the temporary injunction hearing."

The temporary injunction hearing in the Gerling lawsuit was set for February 5, 2002. Debtor filed its bankruptcy petition on February 4, 2002. Accordingly, the Gerling lawsuit was stayed.

Peerbhai, on behalf of debtor, executed the documents that purported to transfer the promissory

notes from debtor to Lex on the same day that debtor's counsel entered a binding Rule 11 agreement stating that debtor would not transfer any assets outside the regular course of business. The Lex Transfer was clearly not within debtor's regular course of business.

On or about January 10, 2002, Wells Fargo filed a lawsuit against MG and Peerbhai (hereinafter, the Wells Fargo lawsuit). According to Wells Fargo's pleading, it filed the lawsuit after learning about the Onyx/PC Group Transfer.

Wells Fargo obtained a temporary restraining order from the 157th Judicial District Court of Harris County, Texas, against Peerbhai and others on January 10, 2002. Under the temporary restraining order, Peerbhai was restrained from transferring or disposing of a material portion of his assets or transferring or dissipating the proceeds of his sale of the stock of Amcorp General. Wells Fargo, Peerbhai, and others submitted an agreed temporary injunction to the state court that was entered on January 23, 2002. Under the temporary injunction, Peerbhai continued to be bound by the same restrictions contained in the prior temporary restraining order.

At the same time that court orders prohibited transfers of property of debtor and Peerbhai, Peerbhai was secretly transferring the debtor's promissory notes to himself and his brothers.

Other Concealed Transfers

In addition to actually concealing (1) the Lex Transfer, (2) the cash payments Peerbhai received from the sale of company stores, and (3) promissory note payments received by Peerbhai, debtor's statements of financial affairs also fail to disclose substantial payments that debtor made directly to Peerbhai during the 12 months before the petition date.

Debtor's statements of financial affairs and schedules also fail to reference the numerous payments that debtor made to third-parties on Peerbhai's behalf. Peerbhai regularly paid his personal expenses with debtor's funds. Many expenses were paid without a written record, and these records cannot be reconstructed. The records that do exist, however, show that Peerbhai made a regular practice of paying his and his family's personal bills from debtor's bank accounts. Written expense records show that debtor paid Peerbhai's home water bill, his home cable bill, his home electric bill, building materials for his home, law maintenance at his home, pool and spa service at his home, repair fees and marina fees for his personal yacht, and cleaning expenses for Peerbhai's Chicago condo. Debtor also paid credit card bills for Peerbhai and his wife that shows purchases at jewelry stores, clothing stores, and Toys R Us, among other non-business purchases. Peerbhai has now conceded this fact, but has neither produced records of this information nor amended debtor's statement of financial affairs or schedules to reflect this information.

Debtor's statements of financial affairs and schedules also fail to record the payments that debtor made for the benefit of other businesses owned by Peerbhai which are unrelated to debtor's business. For example, records show that debtor paid payroll and related expenses for a Day's Inn hotel that Peerbhai owned. Other records show that debtor paid living expenses for the employees of a short-lived restaurant/club that Peerbhai opened in McAllen, Texas called Padrino's, and for a furniture company known as Amco Furniture.

Since 2000, debtor has not made any effort to reconcile its books and records to account for paying Peerbhai's personal and non-debtor business expenses. It would be impossible to reconstruct all the records that show how much money debtor as spent on Peerbhai's personal expenses and the expenses related to his other businesses.

Debtor also paid for other extravagances enjoyed by Peerbhai. For example, debtor paid for a Rolls Royce automobile leased by Peerbhai using the d/b/a of "Amco Insurance," in addition to a Mercedes 500SL, a Chevrolet Suburban, and several other vehicles. The monthly lease payment for the Rolls Royce alone was in excess of $4,000 per month.

Debtor also leased and purchased vehicles for Peerbhai's family.

Peerbhai freely took money from debtor to support an extravagant lifestyle for himself, his wife,

and his children. He also took money from debtor to finance his other business ventures.

Peerbhai's Concealment in the Bankruptcy

Debtor's statements of financial affairs, each of which Peerbhai signed under oath, fail to account for debtor's non-salary payments to Peerbhai, the personal expenses that debtor paid on Peerbhai's behalf, and the expenses that debtor paid on behalf of unrelated companies owned by Peerbhai. They also fail to account for the extravagances that he enjoyed at debtor's expense.

Peerbhai has established a pattern of concealing facts about the financial affairs of debtor and his inappropriate conduct regarding debtor until confronted with documents that prove his sworn statements to be false. Today, he continues to conceal facts regarding the expenses that debtor paid on his behalf and money that he received from debtor or which was rightfully due to debtor.

Peerbhai's Additional Conduct Relating to Debtor

As discussed in detail above, it is clear that money flowed freely between debtor and Peerbhai. Debtor's CFO testified that there was no distinction between what assets belonged to debtor and what assets belonged to Peerbhai. Debtor's records, and the lack thereof, provide additional evidence to support this testimony.

Debtor was a mere instrumentality of Peerbhai. Their financial affairs are hopelessly entangled, and it is impossible to reconstruct where one's assets end and the other's assets begin. Neither Peerbhai nor any records that he or debtor maintained are able to account for how much money he took from debtor in the 12 months before the petition date, or in years past.

Debtor failed to pay state franchise taxes due May 15, 2001. The state Texas duly sent debtor a notice of forfeiture stating that its rights and privileges to operate as a corporation would be revoked for nonpayment of franchise taxes. Debtor did not pay its taxes in response to the notice of forfeiture. Debtor's taxes remained unpaid until October 26, 2001. Peerbhai was an officer and director of debtor during the five-month period between May 15, 2001 and October 26, 2001. See Texas Tax Code § 117.255.

Debtor's records show that Peerbhai used debtor for a fraudulent purpose.

There are no reliable ledgers, financial statements, or accounting information from Peerbhai or debtor that reflect even the financial improprieties already uncovered by the trustee. In addition, Peerbhai and debtor, through Peerbhai, have not cooperated with the trustee's investigation.

Conclusions Of Law

This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. 157 and 1334. This is a core

proceeding as to which the Court may enter final judgment under 28 U.S.C. § 157(b)(2)(A) and (O). Venue of this action is proper in this Court pursuant to 28 U.S.C. § 1408 and 1409(a).

The Court has the jurisdictional authority to substantively consolidate Peerbhai's estate with AIA's estate pursuant to Section 105(a) of the Bankruptcy Code.

All of AIA's creditors will benefit greatly from substantive consolidation with Peerbhai's estate. None of AIA's creditors will be unfairly harmed by the consolidation.

None of Peerbhai's creditors will be unfairly harmed by the consolidation.

Peerbhai made no meaningful distinction between his funds and AIA's funds while AIA was a going concern. Peerbhai and AIA effectively operated as a single financial entity prior to the petition date.

It is impossible to conduct an accurate accounting of the financial affairs of Peerbhai and AIA to segregate their assets because Peerbhai and AIA deliberately failed to keep records and retain documents that would allow such an accounting to be done.

The Fifth Circuit has not provided express guidance on the specific analysis the Court must undertake to determine whether to substantively

consolidate Peerbhai and AIA. The facts of this proceeding, however, support substantive consolidate under each of the various tests recognized by other federal courts.

The financial affairs of AIA and Peerbhai are so entangled that the assets of each cannot be segregated, and consolidation will benefit all creditors. The evidence shows that Peerbhai took at least $3 million from AIA in the two years prior to the petition date and that the total would probably be higher if more records were available.

There is substantial identity between Peerbhai and AIA. Creditors of AIA dealt with Peerbhai and AIA as a single economic unit and did not rely on their separate identity in extending credit.

Substantive consolidation of Peerbhai and AIA is necessary in this case to avoid the substantial harm to creditors that will occur by creating a wall separating the finances of AIA and of Peerbhai that did not exist before the petition date. It will also avoid the harm of AIA's creditors recovering virtually nothing in a bankruptcy that was largely caused by Peerbhai looting the AIA.

Substantive consolidation of Peerbhai and AIA will result in substantial benefit for their creditors. The estate will gain preference and fraudulent transfer actions to set aside transfers to Wells Fargo and potential third parties.

In light of Wells Fargo's knowledge and the circumstances surrounding the execution of the Limited Forbearance Agreement, Wells Fargo is not unfairly harmed by substantive consolidation. To the extent Wells Fargo may have been prejudiced by substantive consolidation, the prejudice is not unfair and the benefits to be gamed by other creditors in this case substantially outweigh any such prejudice. Furthermore, Wells Fargo did not rely on the separate credit of Peerbhai, AIA, or AIG.

The avoidance of the liens granted to Wells Fargo by Peerbhai pursuant to the Limited Forbearance Agreement would simply return Wells Fargo to its position as of the petition date.

The substantial interrelationship of Peerbhai and AIA necessitates the substantive consolidation of their assets and liabilities.

The trustee's substantial efforts to discover the true state of AIA's financial affairs demonstrate that it is impossible to identify or segregate the separate assets and liabilities of Peerbhai and AIA.

Peerbhai and AIA freely commingled assets, treated AIA's assets as Peerbhai's assets, and failed to keep records of the commingling. They failed to keep records that could be used to create records of the commingling. There was a constant, undocumented free flow of funds from AIA to Peerbhai. Peerbhai, his brother the CFO and his brother the COO, treated AIA's assets as if they were Peerbhai's, they did not

keep track of the transfers, and it would be impossible to separate assets of Peerbhai from the assets of AIA.

Peerbhai and AIA did not observe corporate formalities required by Texas law.

Peerbhai's conduct has placed substantial assets of AIA beyond the grasp of AIA's creditors.

Peerbhai treated AIA as an alter ego of himself, taking money out of AIA without observing corporate formalities, usurping corporate assets for his own benefit, and effectively consolidating his own financial being with that of AIA in a way that could not have been ignored by Wells Fargo or any other reasonably diligent party extending credit to Peerbhai. Peerbhai used the AIA's corporate status to commit fraud against his creditors and the AIA's creditors.

The estates of Peerbhai and AIA, including all their respective assets and liabilities, should be substantively consolidated.

The substantive consolidation of Peerbhai and AIA should be effective nunc pro tunc to the petition date because, during all relevant times, Peerbhai and MA operated as one financial entity.

The substantive consolidation of Peerbhai and AIA nunc pro tunc to the petition date follows logically in order to permit creditors of each to be treated in the same manner for purposes of the preference and fraudulent transfer provisions of the Bankruptcy Code.

The benefits of substantive consolidation nunc pro tune to the joint estate's creditors far outweigh any harm to be suffered by Wells Fargo or any other creditor. All avoidance actions that the trustee may gain as a result of nunc pro tunc consolidation are expressly preserved by this order.

Under Texas law, AIA's corporate privileges were revoked upon AIA's failure to pay its state franchise taxes. Pursuant to Texas Tax Code § 171.255, Peerbhai, as an officer and director of AIA, is personally liable for all debts incurred by AIA during the five month period from May 15, 2001 to October 26, 2001.

The trustee's agreement to an order lifting the stay in AIG's bankruptcy case does not operate as any form of estoppel against substantive consolidation or against any avoidance actions that the trustee may file after consolidation. The granting of an order modifying the stay generally does not constitute collateral estoppel, res judicata, or issue preclusion because the procedure for modifying the stay is designed to be a summary proceeding. See Grella v. Salem Five Cent Savings Bank, 42 F.3d 26, 3 1-35 (l' Cir. 1994); Matter of Vitreous Steel Products, 911 F.2d 1223, 1232 (7th Cir. 1990).

Where appropriate, findings of fact set forth herein shall be construed as conclusions of law and conclusions of law set forth herein shall be construed as findings of fact.

Signed this 25 day of Sept, 2003 at Houston, Texas.

/s/ Karen K. Brown
KAREN K. BROWN
UNITED STATES
BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
	§	
AMCO INSURANCE	§	CASE NO. 02-31265-H5-7
AGENCIES, INC.,	§	
	§	[entered Nov. 17, 2003]
DEBTOR	§	

ORDER GRANTING SUBSTANTIVE CONSOLIDATION

On May 2 and 23, 2003, a hearing was held on the Application for Substantive Consolidation filed by Ronald J. Sommers, Chapter 7 Trustee for the estate of Amco Insurance Agencies, Inc. (the "Trustee"), seeking to substantively consolidate this bankruptcy estate with the bankruptcy estate of Rehmat Peerbhai, Case No. 02-44814-H5-11, which is also pending in this Court. The Court finds that notice of the Application for Substantive Consolidation was served on all known creditors of both Amco Insurance Agencies, Inc. and Rehmat Peerbhai. For the reasons set forth in the Findings of Fact and Conclusion of Law filed in this case (as those Findings of Fact and Conclusion of Law may be amended), the Court finds good cause to grant the relief requested.

It is hereby ORDERED that this bankruptcy estate is substantively consolidated with the bankruptcy estate of Rehmat Peerbhai, Case No. 02-

44814-H5-11, which consolidation shall be effective *nunc pro tunc* as of February 4, 2002, the date that Amco Insurance Agencies, Inc. filed this bankruptcy case. To the extent necessary, this Order shall preserve any and all avoidance powers of the Trustee for the benefit of the bankruptcy estate, as consolidated. This is a final order.

SIGNED this 17 day of Nov, 2002.

/s/ Karen Brown
HONORABLE KAREN BROWN
UNITED STATES
BANKRUPTCY JUDGE

APPROVED:

/s/ Davis S. Elder

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 04-20841

In The Matter Of: AMCO INSURANCE; REHMAT PEERBHAI

Debtors

WELLS FARGO BANK OF TEXAS N A

Appellant

V.

RONALD J SOMMERS, Trustee; AMCO INSURANCE; REHMAT PEERBHAI

Appellees

Appeal from the United States District Court for the Southern District of Texas, Houston

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May 4, 2006

ON PETITION FOR REHEARING

Before JOLLY, DENNIS, and OWEN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
United States Circuit Judge

REHG-2

11 U.S.C.A. § 362(d) (West 2004 & Supp. 2006)

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if--

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later—

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments that—

(i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the

commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate; or

(4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, and defraud creditors that involved either—

(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

(B) multiple bankruptcy filings affecting such real property.

If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.